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No. 02-1031

In The Supreme Court of the United States

STEPHEN BARRY SCHER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether There Are True Disparities In The National Application Of Principles Announced By This Court Relating To Pre-Arrest Delay?

II. Whether The Pennsylvania Supreme Court Determination That Scher Failed To Prove That Pre-Arrest Delay Resulted In Prejudice Is In Accord With *Marion* and *Lovasco*?

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Respondent, the Commonwealth of Pennsylvania, respectfully requests this Court to deny the petition for writ of certiorari seeking review of the Opinion and Judgment of the Supreme Court of Pennsylvania.

COUNTER-STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the facts in the opinion below. Petitioner's Appendix A, pp. 2a -19a.

REASONS FOR DENYING THE WRIT

I. There Are No True Disparities In The National Application of Principles Announced By This Court Relating To Pre-Arrest Delay.

Petitioner's perceived differences in national application of *United States v. Marion,* 404 U.S. 307 (1971), and *United States v. Lovasco,* 431 U.S. 783 (1977), in determining whether a due process violation obtains from pre-arrest delay are the natural by-products of nuanced legal analysis, not errors of constitutional dimension requiring the correction of this Court.

Marion recognizes that "actual prejudice" caused by pre-arrest delay does not necessarily abort a criminal proceeding. "Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that *every* delay-caused detriment to a defendant's case should abort a criminal prosecution. " 404 U.S. 307, 324-25 (*emphasis supplied*). *Lovasco* elaborated that the measure of prejudice sufficient to abort a criminal prosecution is one of degree. "We

therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been *somewhat prejudiced* by the lapse of time." 431 U.S. at 796 (*emphasis supplied*).

The Pennsylvania Supreme Court determined that prejudice sufficient to trigger the second prong of the *Marion/Lovasco* analysis is "actual prejudice; that is, [prejudice which] substantially impaired . . .[the] ability to defend against the charges." Petitioner's Appendix, p. 33a. The definition of "actual prejudice" as *substantial* impairment to the ability to defend against prosecution is in concert with, and gives effect to, the teachings of *Marion* that "no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution," 404 U.S. at 324-25, and the admission of *Lovasco* that even a "somewhat prejudiced" defense does not offend due process. 431 U.S. at 796.

This Court foresaw the inherent difficulty in the requisite analysis. "To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325. Courts making this "delicate judgment" have expressed, within an exceedingly narrow range, their understanding of the quantum of prejudice which would substantially impair the ability to defend against charges.[1]

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[1]Courts have characterized such prejudice as "substantial," e.g. *State v. Crail*, 35 P.3d 197 (Hawaii 2001); *State v. Iowa*, 282 N.W.2d 74 (1979); "actual and substantial," *State v. Williams*, 904 P.2d 437 (Ariz. 1995), *State v. Ali*, 660 A.2d 337 (Conn. 1995); *United States v. Kenrick*, 221 F.3d 19 (1st Cir. 2000), *Jones v. Angelone*, 94 F.3d 900 (4th Cir.

That the inferior courts have parsed the concept of prejudice so meticulously reflects scrupulous attention to application of the requisite analysis, not deviance from the controlling precedent of this Court.

More than five years after *Marion*, the *Lovasco* court conceded the continuing difficulty in "determin[ing] in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." 431 U.S. 783, 796. "We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 797.

The passage of decades since *Marion* and *Lovasco* has not yielded an obvious solution to the "continuing difficulty" of resolving this class of due process claims, nor can we expect the difficulty to be susceptible to easy or formulaic resolution in the future. Between the negligible effect of "somewhat prejudiced" and the triggering effect of "actual prejudice" lies a broad expanse. Navigating this expanse will always depend on analysis of "the particular circumstances of individual cases," 431 U.S. at 797. This is what the *Scher* court did; i.e., "[O]ne must take into consideration all of the facts and circumstances surrounding the case. . . ." Petitioner's Appendix, p. 33a. This is what other courts faced with the task have done. See note 1, *supra*. That some courts have spoken of

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1996); "actual and non-speculative," *United States v. Gilbert*, 266 F.3d 1180 (9th Cir. 2001); "severe," *United States v. Day*, 697 A.2d 31 (D.C. Cir. 1970). Each of these cases are among those which Petitioner notes as indicative of "disparate interpretation and application" of controlling federal precedent. *See* Petition, nn.16-17, 20.

"substantial prejudice," while others have spoken of "actual and substantial" prejudice, "severe" prejudice, or "actual and non-speculative" prejudice amounts to distinctions without difference. The corrective action of this Court is not required.

II. The Pennsylvania Supreme Court Determined That Scher Failed To Prove That Pre-Arrest Delay Resulted In Prejudice In Accord With *Marion* and *Lovasco;* The Decision Does Not Require The Corrective Action Of This Court.

The Pennsylvania Supreme Court held that Petitioner Stephen Scher did not meet the burden of demonstrating that a delay of twenty years in charging him with the criminal homicide of Martin Dillon who was found shot dead while in the company of Scher resulted in actual prejudice as defined by *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977). The Pennsylvania Supreme Court recognized that the existence of actual prejudice was the threshold question under federal constitutional analysis and performed the proper legal analysis. A majority of the court concurred in the judgment.

This analysis, and the resulting holding, brings the Pennsylvania Supreme Court decision in *Scher* within the parameters of federal constitutional authority. There is no need for the corrective action of this Court.

Moreover, the questions presented are not ones of national import. Petitioner's first question asks this Court to make a determination of the sufficiency of the evidence as found by the Pennsylvania Supreme Court: i.e., "[H]as sufficient prejudice been suffered by the defendant from the decades-long delay to satisfy the first prong of the due-process pre-arrest delay analysis and to establish a violation of his due process rights." Petition, p. 1, Question 1.

The court below concluded that the pre-arrest delay did not substantially impair Scher's ability to defend against the charges. The Pennsylvania Court supported this conclusion by finding: (1) that certain evidence would have been unavailable to Scher even if charges had been filed immediately after the shooting; (2) that testimony of his own expert negated the importance of other evidence unavailable at trial; (3) that available photographs were comparable to unavailable photographs of the body at the crime scene; (4) that claims of prejudice resulting from the deaths of three witnesses were either speculative, negated by the existence of an unfavorable report prepared by a now deceased witness, or contradicted by Scher's own trial testimony; and (5) that Scher's own medical, forensic experts were able to support his theory of defense to a reasonable degree of medical certainty, despite loss of an audio recording of the first autopsy and the alteration to the victim's body caused by a second autopsy. Petitioner's Appendix, pp. 41a-47a, 76a.

The second question presented also invites this Court to review a state court's factual determination relative to the second prong of the *Marion/Lovasco* analysis.

This portion of the opinion below is entirely *dicta* given that the Pennsylvania Supreme Court found that Petitioner had not met the threshold question of demonstrating that the pre-arrest delay resulted in actual prejudice. This question, like the first , presents no matter of importance calling for this Court's review.

Moreover, a grant of certiorari will not benefit Scher. If this Court were to grant certiorari and if this Court were then to determine that the Pennsylvania Supreme Court had misstated the standard for measuring the threshold determination of prejudice, this act alone would not change the lower court's ultimate determination relative to Scher.

"*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *United States v. Lovasco*, 431 U.S. 783, 790. Even recognizing that Scher had not met the initial burden of establishing actual prejudice, the Pennsylvania Court nonetheless "felt compelled to examine the reasons for the delay in this case to illustrate why the Commonwealth has not violated Scher's right to due process of law." Petitioner's Appendix, p. 51a.

The Pennsylvania Supreme Court attributed the delay in part to the lack of resources of a rural county with a part-time district attorney and in part to Scher himself. The Pennsylvania court noted that Scher "admitted that he had lied to investigators about how Dillon's death occurred and that, for the past twenty years, he lied when

he denied having had an affair with Patricia [Dillon, the then wife of the shooting victim] prior to the incident [the shooting death of Martin Dillon] at Gunsmoke." Petitioner' s Appendix, p. 52a. "[He] instead staged the scene and fabricated a story that gained some credence with investigators," *id.*, a strategy which gave Scher the benefit of twenty years of freedom while married to the widow of the man he murdered.

In proceeding for the sake of discussion to the second prong of the *Marion/Lovasco* standard, the court below gave Scher the benefit of a more generous standard than that of United States Supreme Court jurisprudence. In *dicta,* the Pennsylvania court expanded the circumstances in which government conduct would work a due process violation to include not only conduct undertaken in bad faith (an intentional delay to gain a tactical advantage), but also conduct deemed reckless or "conscience shocking." In *Lovasco* the federal government took a similar position wherein it conceded that "[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of the circumstances . . . " 431 U.S. 796, n.17.

Petitioner reads the *dicta* of the court below as "unfairly restrict[ingI defendants' rights." Petition, p. 20. In fact, application of this broadened standard which encompasses both intentional and reckless government conduct would inure to the benefit of the defendant and to the detriment of the government. Even applying this broadened standard, the Pennsylvania Supreme Court found neither government bad faith or reckless or

shocking government conduct. For these reasons, a grant of certiorari will bring no benefit to Scher.

The Pennsylvania Supreme Court decision should stand, finally, because it corrected the intermediate appellate court's effective creation of a statute of limitations for murder. Scher was charged with and convicted of criminal homicide, an offense for which the Pennsylvania legislature has set no statute of limitations. 42 PA.C.S. § 5551 (West 2002). The ability of the state to bring charges for murder without regard to a limitations period evidences societal repugnance with the deliberate taking of a human life. By vacating Scher's conviction, the intermediate appellate court effectively over-rode the statutory directive that the passage of time will not insulate against prosecution for murder. The Pennsylvania Supreme Court determination gave proper respect to the legislative determination that no statute of limitations should bar prosecution for murder.

Because the Pennsylvania Supreme Court completed the *Marion/Lovasco* analysis and found no merit to the claimed due process violation (even giving Scher , in *dicta*, the benefit of more lenient analysis as to the second prong), Scher himself would have no benefit were the Pennsylvania Supreme Court required to revisit its determination of prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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